When MIB demanded payment for losses on the first three program years (1997-1999) and those funds were not forthcoming, MIB indicated that it may exercise its right to draw on the LOCs. C.A. App. 20-21. Despite their obligation to reimburse MIB and resolve any dispute in Bermuda, petitioners filed suit in Illinois federal court in April 2002 against MIB and other entities, alleging fraud and mismanagement of the program. Pet. App. 6a; C.A. App. 181. The next day, petitioners filed additional suits in federal courts in Michigan and California. Based on the same fraud allegations as in Illinois, both complaints sought to prevent MIB from drawing down on the LOCs posted under the Shareholder Agreement pursuant to petitioners' indemnity obligations. Pet. App. 6a; C.A. App. 7, 21-24.

MIB moved to dismiss the three lawsuits on venue and jurisdictional grounds. The Illinois claims were dismissed as barred by the contractual forum-selection clause. Two months later, the California court (Judge King) refused to give preclusive effect to that decision and preliminarily enjoined a California bank from paying on one of the LOCs. Pet. App. 7a; C.A. App. 743, 962. Shortly thereafter, in the Eastern District of Michigan, Judge O'Meara followed suit, barring draws on the other LOCs at issue here. Pet. App. 16a.

B. The District Court's Preliminary Injunction.

Judge O'Meara issued a preliminary injunction on June 18, 2003, enjoining Comerica Bank from paying on three LOCs totaling approximately $5.1 million. The order "adopt[ed] as applicable * * * the findings of fact and conclusions of law" from Judge King's California transcript and injunction order, without identifying which of those findings and conclusions were "applicable." Pet. App. 18a-20a. Judge King had stated "there has been sufficient showing of likelihood of success on the merits of * * * material fraud" and a "possibility of irreparable injury" given the "financial circumstances of the Mutual entity." C.A. App. 932-934, 955. Judge King had

repeatedly stressed, however, that litigation of the merits would occur elsewhere (in Illinois or Bermuda).[2] C.A. App. 934.

The Michigan injunction bars payment of the LOCs until the earlier of June 18, 2006 or "[f]inal resolution of the merits of the underlying claims * * * in either the Illinois federal court or Bermuda." Pet. App. 19a. The injunction was conditioned on petitioners' "diligent prosecution" of their then-pending appeal of the Illinois dismissal to the Seventh Circuit and commencement of an action in Bermuda within 30 days "to prosecute th[os]e claims" should that appeal be "unsuccessful." Pet. App. 19a-20a. As a result of the injunction, MIB has not been even partially reimbursed for the $8.1 million it paid Legion in May 2003 to terminate any further liability for losses under petitioners' insurance program. MIB 6th Cir. Addendum A-18.

After the Seventh Circuit affirmed the dismissal of petitioners' Illinois claims—holding that the forum-selection clause required that any litigation must be brought in Bermuda (364 F.3d at 887-889)—petitioners filed suit in Bermuda against MIB and others in June 2004. In their Bermuda complaint, petitioners are requesting judgment on the merits of their fraud claims together with an order that MIB "is not entitled to draw upon any" of the LOCs at issue in this case. Pet. App. 8a; MIB 6th Cir. Opp. to Stay of Mandate, Ex. A.

C. The Sixth Circuit's Decision.

On appeal, MIB provided a number of reasons why the injunction should be overturned, including the applicability of the forum-selection clause. In a unanimous, unpublished opinion, the Sixth Circuit reached only one of those grounds: it vacated the preliminary injunction "for failure of the [petitioners] to demonstrate irreparable injury." Pet. App. 9a.

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[2] Judge King stated he did not reach MIB's personal jurisdiction and venue objections, but also indicated that issuance of the injunction was not precluded by the forum-selection clause or any collateral estoppel effect of the Illinois dismissal. C.A. App. 955-957.

The court first recited the "general principle" that an injury is not "irreparable" if it can later be compensated by money damages, except in extraordinary circumstances. Relying on decisions from the First, Fifth, and Ninth Circuits involving LOCs, the court explained that injunctions against payment are often denied because "monetary loss is the only alleged harm." Pet. App. 10a-11a.

On the facts "[i]n the instant case," the court concluded, "the only injury that the Hendrickses have alleged is monetary" and they have asserted no "exceptional circumstances" to show that the purported harm is irreparable. The proffered evidence of "insolvency" principally related to Legion, and "[w]ithout more," that was insufficient. Nor had petitioners argued they were without any remedy in Bermuda. Accordingly, the court ruled, petitioners had failed to establish that their "potential monetary injury" supported "an injunction preventing Comerica Bank from honoring [MIB's] draws on the letter of credit." Pet. App. 12a-13a.

The Sixth Circuit did *not* "accept," as petitioners maintain, that "MIB had defrauded [them], was likely insolvent and would be unable to satisfy a subsequent judgment." Pet. 15. Because the court's decision turned solely on whether petitioners had met their burden of demonstrating irreparable harm, it had no occasion to address whether petitioners would likely succeed on the merits of their claim of fraud. In fact, the court expressly stated that the "merits" of any fraud claims petitioners might bring in Bermuda "are not relevant to the question before this court." Pet. App. 13a. That the Sixth Circuit denied injunctive relief because petitioners' arguments as to MIB's supposed "insolvency" were inadequate similarly belies any

contention that MIB's insolvency was nonetheless presumed.[3] Pet. App. 12a-13a.

On March 10, 2005, the court of appeals unanimously denied the petition for rehearing and rehearing en banc. Pet. App. 1a-2a. The court subsequently stayed issuance of its mandate pending this petition for certiorari. Pet. App. 14a-15a.

REASONS FOR DENYING THE PETITION

The petition satisfies none of the criteria for a grant of certiorari. Petitioners have pointed to no genuine conflict with any decision of another court of appeals or this Court's precedents. They say the Sixth Circuit articulated some new "rule of law" that the insolvency of an LOC beneficiary can never demonstrate irreparable harm and, as a result, departed from both the Ninth Circuit's ruling in the parallel California proceeding and "national" precedent. Pet. 15-21. But the Sixth Circuit announced no such "novel" rule, and no such conflict exists.

Instead, on a considered assessment of the record, the court made a fact-bound determination as to the absence of irreparable injury. And it did so by applying the well-settled rule in equity that money damages, which is all that petitioners alleged, typically do not constitute irreparable harm. That decision is in accord with rulings in other circuits, which have consistently declined to enjoin payment from LOCs when the plaintiff complains of money loss alone, and have held also that

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[3] Petitioners make much of the fact that MIB did not directly attack their "evidence" of "fraud" and "MIB's insolvency" until appeal. Pet. 11-12. Yet petitioners had the burden of establishing all of the elements for injunctive relief, including likelihood of success on the merits and irreparable injury. MIB believed they had failed to do so and had no obligation to counter that insufficient "evidence" in the district courts. *E.g.*, *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323 (1986). That is why neither the Sixth nor the Ninth Circuit found any waiver when MIB explained why petitioners had not met their burden under Rule 65.

the irreparable injury standard is flexible and depends on the particular circumstances in each case. The supposedly contrary cases cited by petitioners (including that of the Ninth Circuit) are distinguishable because, unlike here, those courts were persuaded that the beneficiary's insolvency was proven. Petitioners may disagree with how the Sixth Circuit applied established equitable principles to the facts before it, but that provides no basis for further review. Sup. Ct. R. 10 (certiorari unjustified where petition argues "misapplication of a properly stated rule of law").

Petitioners' other argument for certiorari, though presented under the guise of federalism, is but another attack on the Sixth Circuit's application of Rule 65 to the facts of this case and is equally misguided. Petitioners claim that the Sixth Circuit "exceeded its authority" by imposing an "injunctive standard higher than * * * that called for by the Michigan legislature." Pet. 21-23. The court's approach, however, was unremarkable; it simply reviewed petitioners' request for injunctive relief through the lens of Rule 65, exactly as *Hanna* v. *Plumer*, 380 U.S. 460 (1965), prescribes in federal diversity cases.

Regardless of petitioners' claims of "conflict" and "confusion," this case is an unsuitable candidate for review due to prudential and justiciability concerns. Not only does the decision below lack any precedential value because it is unpublished, but pending litigation in Bermuda and the impending expiration of the injunction no later than June may well render this case moot before the Court could issue a decision on the merits.

In short, petitioners have presented no reason why the Court should grant certiorari. The petition should be denied.

I. THE SIXTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S PRECEDENTS OR THE LAW IN ANY OTHER CIRCUIT.

A. The Sixth Circuit Did Not Announce A New "Rule of Law" Regarding When Insolvency May Justify Injunctive Relief.

The petition in this case is premised on the assumption that the Sixth Circuit "held that a finding of irreparable harm * * * can never be based upon evidence of the beneficiary's insolvency, even when the beneficiary's insolvency is uncontested." Pet. 7. According to petitioners, there was "undisputed evidence * * * that MIB was *insolvent*," but the Sixth Circuit nonetheless supposedly held that "the insolvency of a beneficiary of a letter of credit (and therefore *impossibility of recovery* in subsequent merits litigation) could never, as a matter of law, constitute irreparable harm." *Id.* at 11, 13.

Neither of petitioners' propositions is correct. The Sixth Circuit did not issue the sweeping legal pronouncement that petitioners attribute to it. Rather, after analyzing the factual record in this case, the court concluded that the evidence was legally insufficient to establish irreparable harm. This was consistent with the evidentiary record in this case: contrary to petitioners' assertions, there was no evidence that *MIB* was insolvent—all of the evidence of insolvency concerned *other* entities.

1. It is evident from the Sixth Circuit's opinion that its ruling vacating the injunction "for failure of the plaintiffs to demonstrate irreparable injury" (Pet. App. 9a) rested on the particular facts in this case. To begin with, the court did not "accept[]" that MIB was "likely insolvent," as petitioners would have it. Pet. 15. Rather, the Court noted that petitioners

> *argue* that they have met this burden by presenting evidence that Mutual Indemnity is insolvent, and that various related entities are also insolvent, which they

> primarily demonstrate through the introduction of the rehabilitation proceedings for Legion Insurance, a related entity.

Pet. App. 12a (emphasis added). In the very next sentence, the court stated that "[w]ithout more, this does not constitute" irreparable harm. *Ibid.* Because of the juxtaposition of the two sentences, it is clear that the court's conclusion in the second sentence was based on the insufficiency of the evidence it summarized in the first sentence, which petitioners had "argue[d]" was adequate to establish irreparable harm. *Ibid.*

The Sixth Circuit confirmed this later in the same paragraph:

> Here, the *chance* that Mutual Indemnity is or will become bankrupt and will not be able to satisfy a judgment obtained against it presents less threat of irreparable harm than the chance that there will not even be a proceeding available in which to obtain that judgment.

Pet. App. 12a (emphasis added). The court went on to rule that the risk of irreparable harm from the lack of another proceeding was minimal—the court noted that "the Hendrickses have not argued that they can never achieve a remedy in Bermuda courts." *Ibid.* Accordingly, the court's determination that there was even "less threat of irreparable harm" than that from "the chance" that MIB might become bankrupt and be unable to satisfy a judgment, necessarily resulted from the court's view of the weakness of the evidence concerning MIB's financial circumstances. Far from ruling that MIB was "insolven[t]" and that it would be "impossib[le]" for petitioners ever to recover any sums paid to MIB from the LOCs (Pet. 13), the Sixth Circuit held that petitioners had not proven anything more than "potential monetary injury" (Pet. App. 13a), which was sufficiently unlikely to occur that it did not constitute irreparable harm.[4]

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[4] Petitioners ignore the fact that the Sixth Circuit's assessment of irreparable harm turned on the low "*chance* that Mutual Indemnity is

2. The Sixth Circuit's conclusion that there is little chance that MIB will become insolvent comports with the evidence offered in the district court. The record does not contain *any* evidence that MIB is on the brink of insolvency. Petitioners offered only evidence about *other* companies; they have never been able to identify even one piece of evidence that MIB was near insolvency. Indeed, MIB has continued in business and remained solvent throughout this litigation—and that is still true today, more than two years after the district court entered the preliminary injunction. Just before the preliminary injunction was entered, MIB even paid $8.1 million to cap petitioners' potential liability under their insurance program (MIB 6th Cir. Addendum A-18)—a payment it could not have made had it been insolvent.

As the Sixth Circuit noted, plaintiffs relied principally on an order from the Pennsylvania rehabilitation proceedings of Legion Insurance, a separate company, as proof that MIB was somehow "insolvent." Pet. App. 12a. The Pennsylvania order concerned whether to enforce a July 2002 settlement agreement between Legion's rehabilitator and Legion's reinsurers, including MIB. The Pennsylvania court stated that "*[w]ithout enforcement*" of the agreement, "which will fix the obligations of the [reinsurers] thereby *improving their business outlook*," some unspecified reinsurers "may face involuntary insolvency." C.A. App. 599 ¶ 80 (emphasis added). But the court then *enforced* the settlement precisely to avoid that possibility; it concluded that enforcing the agreement would bring MIB and

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or will become bankrupt and will not be able to satisfy a judgment" (Pet. App. 12a, emphasis added)—a formulation indicative of the fact-bound nature of the Sixth Circuit's decision. Instead, petitioners mischaracterize the court as having decided that "whether MIB 'is or will become bankrupt and will not be able to satisfy a judgment' could not constitute irreparable harm, as a matter of law." Pet. 19. As explained above, what the court actually decided was that "the chance" of insolvency established by the petitioners on this record was so low as to be insufficient to constitute irreparable harm.

the other reinsurers "*financial certainty and security.*" C.A. App. 630 ¶ 7 (emphasis added). The Pennsylvania court's conclusion that its order would "improv[e]" MIB's "business outlook," resulting in MIB's "financial certainty and security," is certainly not evidence of insolvency. It is not surprising that the Sixth Circuit held that "[w]ithout more," plaintiffs' evidence did not establish irreparable harm.[5] Pet. App. 12a.

The record also contains the affidavit of William Taylor, a Pennsylvania deputy insurance commissioner overseeing the rehabilitation proceedings of Legion and Villanova Insurance. According to the Ninth Circuit, Taylor's affidavit says that "Mutual 'conceded in its public statements and its filings that it [was] insolvent' " and that a letter from " '[Mutual]' " states that its losses " 'have resulted in the Company becoming insolvent.' " Pet. App. 46a. The Ninth Circuit grossly misread the record. Taylor's affidavit actually refers only to Mutual Risk Management ("MRM"), a separate company, not MIB. The actual passage from Taylor's affidavit is as follows:

> *MRM* has conceded in its public statements and its filings that it is insolvent. For instance, in a letter dated December 23, 2002, sent by David Ezekiel on behalf of *MRM* to "all Scheme Creditors," Ezekiel stated that "the Company has suffered losses over the past 18-24 months, which have resulted in the Company becoming insolvent."

Dist. Ct. Dkt. No. 20, Ex. L, at 9 (emphasis added). Evidence of another corporation's financial difficulties is not evidence about MIB, even if the other corporation is MIB's ultimate corporate parent, several layers removed. See, *e.g.*, *Burnet* v. *Clark*, 287 U.S. 410, 415 (1932) (a corporation and its owners "are generally to be treated as separate entities").

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[5] The Ninth Circuit did not cite any evidence—there is none—in support of its statement that a court could reasonably conclude that MIB was "in a precarious financial position even after enforcement of the [Pennsylvania] agreement." Pet. App. 46a.

The Sixth Circuit's decision to vacate the injunction "due to the lack of a showing of irreparable harm" (Pet. App. 13a) turned on its evaluation of the sufficiency of the evidence in this particular case, not on a broad statement of a new rule of law. The court's ruling was fully consistent with the factual record; there is not the slightest evidence that MIB is in financial distress. There is no reason for this Court to review such a fact-specific decision, particularly because it involves the application of settled legal standards, as we discuss next.

B. The Sixth Circuit's Fact-Bound Ruling On Irreparable Harm Is Entirely Consistent With Prior Decisions Of This Court And Of Other Circuits.

Petitioners contend that the Sixth Circuit's ruling has created "an irreconcilable conflict" with decisions in other circuits, including a "direct conflict" with the Ninth Circuit's ruling in a parallel proceeding in California. Pet. 13. Petitioners' claims of conflict are meritless.

1. Although petitioners assert that the Sixth and Ninth Circuits "reached directly opposite conclusions on the same issues of federal procedure" (Pet. i), the Ninth Circuit did not think so. Refusing to address the question on which petitioners now perceive a conflict, the Ninth Circuit stated explicitly that "[w]e need not and do not decide whether to adopt the Sixth Circuit's holding." Pet. App. 47a.

Moreover, the Ninth Circuit was careful to point out that it was deciding the propriety of an injunction on state law grounds, evaluating petitioners' request pursuant to California Commercial Code § 5109. *E.g.*, Pet. App. 42a ("we look to California law to determine whether the district court could grant a preliminary injunction"). Noting that "[s]ection 5109(b) does not incorporate the common law irreparable injury requirement," the Ninth Circuit declined even to "decide whether there is an irreparable injury requirement for issuance of an injunction" under the California statute. *Id.* at 45a. The

petitioners themselves told the Sixth Circuit that the "conflict" between the decisions of the two circuits derives from the "appl[ication] [of] identical uniform state statutes" rather than federal law. Pl. Mot. to Stay the Mandate, at 9 (6th Cir., filed Mar. 16, 2005). Because the interpretation of a provision in a state code remains an issue of state law no matter the number of states with similar (or even identical) statutes, this Court does not review this type of "conflict." See, *e.g.*, *Ruhlin* v. *New York Life Ins. Co.*, 304 U.S. 202, 206 (1938) ("conflict among circuits [on state law] is not of itself a reason for granting a writ of certiorari"); *Braxton* v. *United States*, 500 U.S. 344, 347 (1991) ("we use our certiorari jurisdiction * * * to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law"). In short, there is no disagreement between the Sixth and Ninth Circuits on an "important federal question." Sup. Ct. R. 10(a).[6]

To be sure, the two courts did arrive at different conclusions about the facts. The Ninth Circuit believed that it was "reasonable" for the California district court to conclude that MIB was in "a precarious financial position" (Pet. App. 46a), while the Sixth Circuit ruled that petitioners had "fail[ed] * * * to demonstrate irreparable injury" (Pet. App. 9a). But that the two courts arrived at different interpretations of the same *facts*—about related companies that are separate from MIB—does not raise a *legal* issue that warrants this Court's review. Petitions for writs of certiorari are not granted "to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); see also *Texas* v. *Mead*, 465 U.S. 1041 (1984) (Stevens, J.); Sup. Ct. R. 10 (certiorari is "rarely granted when the asserted error consists of erroneous factual findings").

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[6] As explained in Part I. C. (*infra* pp. 19-22), Rule 65 governs requests for preliminary injunctions in the federal courts. However, in looking to California's version of § 5109 in evaluating whether to enjoin payment on an LOC, the Ninth Circuit did not decide how Rule 65 standards factor into the equation.

2. Petitioners also maintain that review is warranted because the Sixth Circuit's determination as to the lack of irreparable harm deviates from some "national standard" requiring entry of an injunction whenever the defendant's insolvency is alleged. Pet. 14, 17-21. This meritless argument must be rejected.

To begin with, the premise that there is (or should be) a fixed legal standard that insolvency necessarily suffices to demonstrate irreparable injury is a false one. "Flexibility rather than rigidity" is the hallmark of equity. *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312 (1982). "In equity, as nowhere else, courts eschew rigid absolutes," *Lemon* v. *Kurtzman*, 411 U.S. 192, 201 (1973), and "[w]hat constitutes irreparable injury in a case depends upon the particular facts of that case." *Ciechon* v. *City of Chicago*, 634 F.2d 1055, 1057 (7th Cir. 1980). Because irreparable injury is thus "incapable of precise definition" and subject to change with "the circumstances," *Morgan* v. *Fletcher*, 518 F.2d 236, 239 (5th Cir. 1975), insolvency cannot automatically be equated with unredressable harm. Indeed, although petitioners contend that courts have adopted a rigid rule that insolvency always constitutes irreparable harm, in fact courts have refused to hold that "irreparable injury exists *in every case* in which a judgment will probably go unsatisfied absent an injunction." *Elliott* v. *Kiesewetter*, 98 F.3d 47, 58 n.8 (3d Cir. 1996). Accord, *e.g.*, *Carter-Wallace, Inc.* v. *Davis-Edwards Pharmacal Corp.*, 443 F.2d 867, 874 (2d Cir. 1971) (Friendly, J.) (rejecting the argument that "defendant's insolvency constitutes ground" for an injunction because "it is not unreasonable to believe that [defendant] will have sufficient assets to respond to plaintiff's recoverable damages for infringement").

Try as petitioners might to devise a "legal standard" that the Sixth Circuit transgressed, there is none. Some general considerations relevant to the irreparable injury inquiry are settled. But, contrary to petitioners' assertion that the Sixth Circuit strayed from "uniform" law in denying injunctive relief, its decision adheres to the governing precepts. Pet. 19. The Sixth

Circuit used as its starting point the accepted principle that monetary injury ordinarily will not be deemed irreparable. Pet. App. 11a; *Sampson* v. *Murray*, 415 U.S. 61, 90 (1974).[7] The court also acknowledged, and employed, the established exception to that principle—that "extraordinary circumstances" may nonetheless give rise to the irreparable injury required to obtain a preliminary injunction. Pet. App. 12a; *Sampson*, 415 U.S. at 92 n.68. But after evaluating the record, the Sixth Circuit was unable to find irreparable harm on the facts before it; petitioners had not presented enough evidence on the question of *MIB*'s insolvency to convince the court that "their potential monetary injury constitutes an exceptional circumstance." Pet. App. 13a.

Petitioners may quarrel with how the court applied "the general principle that an injury is not 'irreparable' unless 'it cannot be undone through monetary remedies' " (Pet. App. 11a), but that is not the sort of "error" worthy of a grant of certiorari. Sup. Ct. R. 10. This Court in *Sampson* recognized as much, noting that while injunctive relief is not foreclosed in the "genuinely extraordinary situation" involving monetary loss, those "extraordinary cases are hard to define in advance of their occurrence." 415 U.S. at 92 n.68. The Court left such fact-bound determinations to the lower courts. *Ibid.*

Because it properly relied on settled law, the decision below does not create a "split" among the circuits or foster any

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[7] See also, *e.g.*, *JSG Trading Corp.* v. *Tray-Wrap, Inc.*, 917 F.2d 75, 79 (2d Cir. 1990) ("it is settled law that when an injury is compensable through money damages there is no irreparable harm"); *Instant Air Freight Co.* v. *C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir. 1989) ("'[W]e have never upheld an injunction where the claimed injury constituted a loss of money'"); *Dos Santos* v. *Columbus-Cuneo-Cabrini Med. Ctr.*, 684 F.2d 1346, 1349 (7th Cir. 1982) ("temporary loss of income does not usually constitute irreparable injury"); *Goldie's Bookstore, Inc.* v. *Superior Court of Cal.*, 739 F.2d 466, 471 (9th Cir. 1984) ("[m]ere financial injury * * * will not constitute irreparable harm").

"uncertainty and confusion" about when "a District Court * * * should be able to issue an injunction." Pet. 26; see Pet. 17-21. The Sixth Circuit looked not only to its own prior decisions but also those of the First, Fifth, and Ninth Circuits before finding that petitioners failed to carry their " 'burden of proving that the circumstances clearly demand[ed]' " an injunction. Pet. App. 10a-11a (citing *Foxboro Co.* v. *Arabian Am. Oil Co.*, 805 F.2d 34 (1st Cir. 1986); *Enterprise Int'l, Inc.* v. *Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464 (5th Cir. 1985); *Trans Meridian Trading, Inc.* v. *Empresa Nacional de Comercializacion de Insumos*, 829 F.2d 949 (9th Cir. 1987)). The Sixth Circuit's application of the "monetary injury" rule fully accords with the practice in those and other courts of appeals that have refused to enjoin payment on LOCs when the record demonstrates that an adequate legal remedy is available. Pet. App. 12a-13a; *Enterprise*, 762 F.2d at 474-475; *Foxboro*, 805 F.2d at 37; *Trans Meridian*, 829 F.2d at 956; *KMW Int'l* v. *Chase Manhattan Bank, N.A.*, 606 F.2d 10, 14-16 (2d Cir. 1979).[8] Observing that the Fifth Circuit's approach in *Enterprise* to "preliminary injunctions and international letters of credit" has been "widely adopted," the Sixth Circuit likewise used that decision as a guide.[9] Pet. App. 10a. Unsurprisingly, the court did not express disagreement with a single decision from another jurisdiction.

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[8] See also *Sperry Int'l Trade, Inc.* v. *Israel*, 670 F.2d 8, 12-13 (2d Cir. 1982); *Interco, Inc.* v. *First Nat'l Bank of Boston*, 560 F.2d 480, 485-486 (1st Cir. 1977).

[9] The Sixth Circuit's reliance on *Enterprise* can therefore hardly be described as "inexplicable." Pet. 17. As in *Enterprise* and the other cases cited by the court, it was appropriate to factor into the injunctive relief assessment the fact that petitioners were seeking to enjoin draws on three LOCs. Despite what petitioners say (at 20), the context in which an injunction is sought does make a difference because that is part of the fact-intensive inquiry into irreparable harm. Petitioners even concede as much by later highlighting the "special" qualities of LOCs. *Id.* at 24-26.

Petitioners strive to manufacture a conflict by claiming that the Sixth Circuit simply "ignored [contrary] precedent" in this Court and other courts of appeals. Pet. 20. There is, however, a critical distinction between this case and each of the decisions on which petitioners rest their claim of conflict. As petitioners' own discussion reflects (*id.* at 17, 19-20), in every one of the cited cases, the injunctions were issued because plaintiffs had satisfied their burden of establishing that the assets that might be dissipated were those of the insolvent party, not a defendant like MIB whose own financial situation was not even the subject of record evidence, let alone proven to be verging on bankruptcy. *E.g.*, *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 290 (1940) (injunction could legitimately restrain third party from transferring assets belonging to insolvent vendor); *United States ex rel. Taxpayers against Fraud* v. *Singer Co.*, 889 F.2d 1327, 1330 (4th Cir. 1989) (upholding injunction because a "realistic threat of [defendant's] insolvency" was "substantially" supported by the record).

The one decision involving LOCs which petitioners principally see as supporting the need for this Court's review, *Brenntag International Chemicals* v. *Bank of India*, 175 F.3d 245 (2d Cir. 1999), actually underscores the absence of any conflict. Presented with arguments that the financial stability of companies besides the LOC beneficiary should preclude an injunction, the Second Circuit made clear that it was the obvious insolvency of the beneficiary itself—which was in liquidation and "an admittedly non-delivering seller"—that justified "finding irreparable harm." *Id.* at 250. That the Second Circuit engaged in a fact-specific inquiry into whether insolvency amounts to irreparable injury is demonstrated by its reference to Judge Friendly's opinion in *Carter-Wallace, Inc.*, 443 F.2d at 874. *Carter-Wallace* vacated a preliminary injunction because, though the defendant was insolvent, it had "sufficient assets [identified in its bankruptcy proceeding] to respond to plaintiff's recoverable damages for [patent] infringe-

ment." *Id.* at 874.[10] The court here undertook this very same analysis—evaluating whether, as the LOC beneficiary, MIB would "be able to satisfy a judgment obtained against it." Pet. App. 12a.

The decision below faithfully applied relevant precedent, and petitioners, at best, merely ask the Court to examine whether the Sixth Circuit correctly applied settled law. There is no reason why this Court should review a fact-bound ruling that in no way conflicts with the decisions of this Court or other courts of appeals.

C. The Sixth Circuit's Decision Did Not Interfere With Michigan's Law But Rather Properly Applied The Federal Rules of Civil Procedure.

Petitioners' further assertions that the Sixth Circuit "inject-[ed] new and higher standards of injunctive relief into an enactment of the Michigan legislature" and that the Sixth Circuit overrode a "state-created right" are similarly misguided. Pet. 14, 21-24. Petitioners recognize that Rule 65 controls in diversity cases, Pet. at 18, yet suggest that the Sixth Circuit's ruling somehow alters substantive Michigan law.

Consistent with this Court's decision in *Hanna* v. *Plumer*, 380 U.S. 460 (1965), and every circuit to have decided the issue, the Sixth Circuit straightforwardly reviewed the district court's grant of a preliminary injunction under Fed. R. Civ. P. 65, which applies to all federal court injunctions, including those requested in diversity cases. In doing so, the Sixth Circuit did not "re-write" or alter Michigan law. Petitioners may believe that the Sixth Circuit wrongly applied Rule 65, but for the reasons already explained, that is both incorrect and a fact-

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[10] *Carter-Wallace* shows that even if petitioners were correct that MIB's insolvency must be presumed, there would still be no *legal* requirement that an injunction issue and no basis for this Court's review.

specific issue that should not occupy this Court's time or energy.

Petitioners' appeal to the *Erie* doctrine calls the Court's attention only to the beginning of the story. Pet. 21 (mentioning *Erie* and citing *Guaranty Trust Co. of New York* v. *York*, 326 U.S. 99 (1945)). Nearly thirty years after deciding *Erie*, this Court criticized "the incorrect assumption that the rule of [*Erie*] constitutes the appropriate test of the validity and therefore the applicability of a Federal Rule of Civil Procedure." *Hanna*, 380 U.S. at 469-470. *Hanna* carved out a separate analytical track for the Federal Rules of Civil Procedure:

> When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and *can refuse to do so only if* the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in questions transgresses neither the terms of the Enabling Act nor constitutional restrictions.

Id. at 471 (emphasis added). *Hanna* is unambiguous: a federal court sitting in diversity must apply a constitutionally and statutorily valid Federal Rule. Otherwise, "[t]o hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act." *Id.* at 473-474. See also *Burlington N. R.R. Co.* v. *Woods*, 480 U.S. 1, 5 (1987) (federal rule must be applied unless it is not a "valid exercise of Congress' rulemaking authority, which originates in the Constitution and has been bestowed on this Court by the Rules Enabling Act").

Federal courts sitting in diversity have consistently ruled that Rule 65 governs preliminary injunctions and constitutes a valid

exercise of rulemaking authority. The Sixth Circuit's decision in *Southern Milk Sales, Inc.* v. *Martin*, 924 F.2d 98 (6th Cir. 1991), is illustrative. The appellant contended that because a Michigan statute authorized the grant of a preliminary injunction, an injunction was proper so long as that state statute had been violated. *Id.* at 102. The Sixth Circuit disagreed, ruling that Rule 65, and not the Michigan statute, controlled the action. *Id.* None of the courts of appeals to have considered the issue have diverged from this view. See, *e.g.*, *Ferrero* v. *Associated Materials, Inc.*, 923 F.2d 1441, 1448 (11th Cir. 1991) ("[R]ule 65 meets the criteria of *Hanna*, and therefore we apply federal procedure to determine whether the preliminary injunction was properly issued"); *Sys. Operations, Inc.* v. *Scientific Games Dev. Corp.*, 555 F.2d 1131, 1141 (3d Cir. 1977) ("Although the right upon which this cause of action is based is state-created, Rule 65(a) of the Federal Rules of Civil Procedure contemplates a federal standard as governing requests addressed to federal courts for preliminary injunctions").[11] See also 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2943, at 79 (2d ed. 1995) ("No federal court has suggested that * * * Rule 65 is unconstitutional or beyond the scope of the Court's rulemaking power").

Rather than "override a state statute," Pet. at 23, the Sixth Circuit correctly assessed the propriety of the preliminary injunction through the lens of Rule 65. Similar to *Southern Milk*, the relevant Michigan statute (Mich. Comp. Laws § 440.5109(2)) authorized the availability of a preliminary injunction. And, just as in *Southern Milk*, the Sixth Circuit here considered whether the preliminary injunction was proper under Rule 65. Under *Hanna*, this is the right result.

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[11] Accord *Instant Air Freight Co.* v. *C.F. Air Freight, Inc.*, 882 F.2d 797, 799 (3d Cir. 1989); *Capital Tool & Mfg. Co. v. Maschinenfabrik Herkules*, 837 F.2d 171, 172-173 (4th Cir. 1988); *Am. Brands, Inc.* v. *Playgirl, Inc.*, 498 F.2d 947, 949 (2d Cir. 1974); *Gen. Elec. Co.* v. *Am. Wholesale Co.*, 235 F.2d 606, 608 (7th Cir. 1956).

Petitioners' "federalism and comity" argument is but another reformulated attack on the Sixth Circuit's application of traditional preliminary injunction standards to the specific facts of this case. The Sixth Circuit's analysis of the district court's decision under Rule 65 is entirely consistent with this Court's decision in *Hanna* and has no impact upon Michigan state law.

II. THIS CASE IS NOT A PROPER VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

Quite apart from the petition's failure to satisfy the criteria of Rule 10, review is also unwarranted because this case is an exceptionally poor vehicle to resolve the question presented. First, it is not the ordinary practice of this Court to grant certiorari when a decision is unpublished, and there is no compelling reason to do otherwise here. In the Sixth Circuit, unpublished opinions are not binding precedent. *Bell* v. *Johnson*, 308 F.3d 594, 611 n.7 (6th Cir. 2002). There is no cause for this Court to expend its limited resources in resolving a purported conflict when "even the court that rendered the decision may reach a different conclusion in the next case presenting the issue." ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 6.37(c), at 459 (8th ed. 2002); see Sixth Cir. R. 206(c) (only "[r]eported panel opinions are binding on subsequent panels").

Second, this case may well become moot before this Court could decide the questions presented. Petitioners are seeking a court order in Bermuda barring draws on the same LOCs at issue here (MIB 6th Cir. Opp. to Stay of Mandate, Ex. A), and the Michigan injunction, by its express terms, will expire in mid-June 2006 at the latest (or earlier, if the Bermuda case is resolved before June). Pet. App. 19a. That means it is likely that "[n]o order of this Court could affect the parties' rights with respect to the injunction [it is] called upon to review." *Honig* v. *School for Blind*, 471 U.S. 148, 149 (1985). If petitioners either receive or are denied relief in Bermuda, or the Michigan injunction expires in June 2006 of its own accord, the

issues here would be moot. *Oil Workers Int'l Union* v. *Missouri*, 361 U.S. 363, 367-68 (1960) (expiration of injunction by its own terms mooted controversy); *WJW-TV, Inc.* v. *Cleveland*, 878 F.2d 906, 909-910 (6th Cir. 1989) ("no longer a live case" where state court decision resolved issue posed in appeal).

Third, a decision in this case would be of little, if any, practical significance. A ruling by this Court would affect only whether MIB has access to the LOC funds pending resolution of petitioners' merits claims that are now the subject of litigation in Bermuda. That court will ultimately determine if "fraud" was committed or if MIB is entitled to payment.

Moreover, the "controversy as it exists today is * * * quite different from the one that the District Court considered." *American Foreign Serv. Ass'n* v. *Garfinkel*, 490 U.S. 153, 159 (1989) (finding mootness on that basis). Petitioners' principal contention is that the district court properly premised its order on "evidence that MIB was insolvent." Pet. 11. Not only is there no such evidence in the record, but in the more than two years since the injunction issued, MIB has continued operating its business (without a liquidator) and it remains *solvent* still.

For any number of reasons, a decision by this Court would have little or no effect. It would be a waste of private and judicial resources to debate the preliminary injunction issues in this context.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2005

FILED
OCT 13 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 04-1699

In the Supreme Court of the United States

DIANE M. HENDRICKS AND
KENNETH A. HENDRICKS,

Petitioners,

v.

MUTUAL INDEMNITY (BERMUDA), LTD.,
a Bermuda corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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Petitioners, Kenneth Hendricks and Diane Hendricks, file this Reply solely to clarify a misapprehension inevitably presented by Respondent's Brief in Opposition.

Respondent's Mootness Argument Is In Error; The Petition Is A Suitable Candidate For Review

One of the questions presented for review in the petition for writ of certiorari pertained to whether the insolvency of a letter of credit beneficiary demonstrates sufficient irreparable harm to support a preliminary injunction against draws on that letter of credit. In arguing that this case is not a proper vehicle for resolving that question, Respondent suggests that "this case may well become moot before this Court could decide the questions presented." (Resp. at 22.) In support of this argument, Respondent underscores one portion of the preliminary injunction order, which states that the injunction will remain in effect until the earlier of the final resolution of the merits or June 18, 2006.

This Court should be aware, however, that the District Court contemplated that the preliminary injunction order could very well extend beyond June 18, 2006, continuing after that date until final resolution of the merits in Bermuda, as follows:

> If the underlying litigation is not completed by June 11, 2006, and this Court extends this Preliminary Injunction beyond June 18, 2006 as a consequence thereof, then MIB may seek modification of this Order to increase the amount of the bond required herein.

(*See* Appx. D at 20a.)

Manifestly, then, it is not correct to suggest that the litigation between these parties will be concluded in June 2006. It cannot fairly be said that such is the understanding of Judge O'Meara, and there is no basis on which to speculate that the Bermuda litigation on the merits will be concluded before this Court can reach the legal issues that are the subject of Petitioners' petition for writ of certiorari.

Moreover, Respondent's mootness argument can only be addressed to the remote possibility that the determination of the underlying factual merits in this particular case, between these particular parties, may be concluded before this Court's determination of the legal question presented. That legal question, obviously, does not become moot as a jurisprudential matter relative to the state of letter of credit/preliminary injunction law in the Sixth Circuit, as compared to other circuit courts of appeal. Neither the legal nor factual eventualities, inchoate as they are, should impact this Court's consideration of the petition for writ of certiorari.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for certiorari should be granted.

Dated: October 13, 2005

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